United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1716

74-1761

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

-vs-

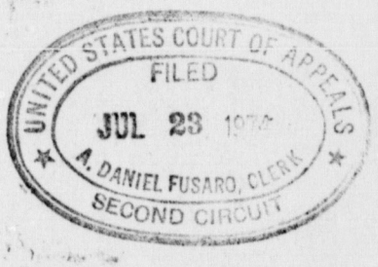
KEITH C. HALBACH

Defendant-Appellant

SEPTEMBER TERM, 1974
DOCKET NO. 74-1716

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT



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PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court for the Western District of New York rendered by Hon. Lloyd F. MacMahon, United States District Judge, on April 30, 1974 following a jury trial.

STATEMENT OF ISSUES

I

Whether the trial court committed reversible error when it refused to permit the jury to consider Halbach's testimony concerning his intent in committing the acts charged and in its instructions to the jury on the issue of intent?

II

Whether the instructions of the trial court to the jury on the issue of specific intent, although containing references to that element of the offenses charged, resulted in reversible error?

III

Whether the trial court committed reversible error when it denied appellants' motion for a judgment of acquittal with respect to counts I and V of the indictment?

STATEMENT OF THE CASE

The appellant, Keith C. Halbach, was indicted by a Grand Jury of the United States District Court for the Western District of New York in a five count indictment charging him with four felony violations of Title 18, United States Code, §495 and one felony violation of Title 18, United States Code, §371.(1)

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(1) Title 18, United States Code
§495. Contracts, deeds, and powers of attorney
Whoever falsely makes, alters, forges, or counterfeits any deed, power of attorney, order certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain, or receive from the United States or any officers or agents thereof, any sum of money; or
Whoever utters or publishes as true any such false, forged, altered, or counterfeited writing, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited; or

* * *

(cont'd on page 3)

A jury trial was held in Buffalo, New York on April 29-30, 1974 and Halbach was found guilty on each of the five counts. He was sentenced to the custody of the Attorney General pursuant to Title 18, United States Code, §5010 (b).

On August 9, 1973, Keith Halbach, an eighteen year old high school dropout, stole six United States savings bonds from an office in the home of their owner, Richard Yox, with whom Halbach resided (transcript 22-24, 26, 65-66). He enlisted the aid of Jack Gilmet, the named co-defendant,(2) to drive him to a branch of the Manufacturers and Traders Trust Company bank for the

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(1) cont'd.

Shall be fined not more than $1,000 or imprisoned not more than ten years, or both.

Title 18, United States Code
§371. Conspiracy to commit offense or to defraud United States
If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * *

(2) The case against Gilmet was disposed of separately.

purpose of cashing the bonds (transcript 56-57). Halbach forged the endorsement of Yox on the back of one of the bonds and was successful in cashing it (transcript 35,69). Attempts to cash other of the bonds were unsuccessful (transcript 59-61). Halbach and Gilmet then divided the proceeds from the cashed bond (transcript 61-62).

Upon the trial the defense proceeded on the theory that Halbach was not guilty of the Federal crimes charged in the indictment because he acted without the specific intent to defraud the United States Government required under each of the five counts (transcript 15-16). Halbach testified in his own defense but the court excluded that portion of his testimony in which he attempted to explain his intent (transcript 65-69). The court reiterated its ruling on the relevance of Halbach's testimony as to his intent in its instructions to the jury (transcript 102-130, 133-135). Defense motions for a judgment of acquittal on counts I and V of the indictment were denied (transcript 63-64, 74). These matters form the major part of the basis for this appeal. The specific facts relevant to the issues on appeal are presented in the argument.

ARGUMENT

I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT REFUSED TO PERMIT THE JURY TO CONSIDER HALBACH'S TESTIMONY CONCERNING HIS INTENT IN COMMITTING THE ACTS CHARGED AND IN ITS INSTRUCTIONS TO THE JURY ON THE ISSUE OF INTENT BECAUSE THE EFFECT OF THE COURT'S RULINGS AND INSTRUCTIONS WAS TO REMOVE A PROPER DEFENSE, LACK OF SPECIFIC INTENT, FROM CONSIDERATION BY THE JURY.

The Theory of the Defense, in General

The specific intent to defraud the United States Government is an essential element of each count in the indictment. Although the first paragraph of 18 U.S.C. §495 which covers the forgery counts II through IV of the indictment does not expressly contain the phrase "with intent to defraud the United States", that specific intent is nevertheless an implied element of the forgeries charged. Prussian v. United States, 282 U.S. 675 (1931), United States v. Sullivan, 406 F. 2d 180 (2d Cir. 1969), United States v. Sonnenberg, 158 F. 2d 911 (3d Cir. 1946), Miller v. United States, 397 F. 2d 272 (5th Cir. 1968).

The theory of the defense was that when Halbach committed the acts alleged in the indictment he did so without the requisite

specific intent. In his opening statement counsel for the defendant told the jury: "What it comes down to, as far as we are concerned, what it comes down to is whether or not Keith Halbach not only did the acts concerned, but whether he entertained the specific intent that the Federal law requires," (transcript 15-16). Again upon summation defense counsel submitted to the jury that: "...there is no real dispute as to the acts that were committed by Keith Halbach, there is no dispute about that at all. What we are concerned with is the question of intent" (transcript 81).

The Evidence Offered to Support the Theory of Defense

The only defense evidence sought to be introduced was the testimony of Keith Halbach. Counsel asked a series of questions to prove that Halbach did not commit the acts alleged in the indictment with the specific intent to defraud the United States (transcript 66-69). Part way through the questions the court, sua sponte, eliminated the proposed proof from the case as immaterial:

(BY MR. HILL)

* * *

Q. What did you think these things you took were?

A. Similar to money, I thought it was Richie's money.

Q. Did you know there was a separate Federal law governing this situation?

THE COURT:

Sustained.

BY MR. HILL:

Q. Did you know at all that the United States Government was involved in this situation?

THE COURT:

Sustained.

MR. HILL:

Excuse me, your Honor, I don't understand the basis for it.

THE COURT:

It is immaterial.

BY MR. HILL:

Q. When did you first become -- strike that. When did you first learn that the United States Government was involved in the situation?

THE COURT:

Sustained. Since the Government hasn't objected to these questions, I will permit him to answer, but I must charge the jury that it is immaterial. If you want to ask him,

with full knowledge that I am going to so charge the jury, go ahead.

MR. HILL:

Alright, your Honor. I do this for the purposes of the record, with all respect, your Honor. Thank you, your Honor.

THE COURT:

That is why I am permitting you to do it. (transcript 66-67).

Counsel then completed his questioning for the record (transcript 67-69).

Since Halbach's intent in committing the acts alleged was directly in issue as an element of each of the crimes charged, the proposed testimony was material and admissible:

> "Whenever the belief of a person, or the motive or intent of his act or conduct is material, he may testify directly what it was (citation omitted). He may also give the grounds of the belief upon which his motive or intent proceeded,...". Buchanan v. United States, 233 Fed. 257, 259 (8th Cir. 1916). See also Miller v. United States, 120 F. 2d 968 (10th Cir. 1941), Haigler v. United States, 172 F. 2d 986 (10th Cir. 1944), Hargrove v. United States, 67 F. 2d 820 (5th Cir. 1933).

At the very least Halbach was entitled to have the offered testimony submitted to the jury. In Haigler v. United States, supra, the court held in similar circumstances:

> "Unconvincing as it may be, this testimony was plainly admissible as bearing upon the essential element of intent to commit the offense charged, and we think it was error to exclude it." 172 F. 2d 986, 988.

The Instructions to the Jury on the Theory of Defense

The error committed in excluding the testimony offered by appellant was compounded in the instructions to the jury. With reference to the element of specific intent to defraud the United States the jury was instructed:

* * *

> "There the defendant's position is, as I understand it, that he did not know that he was violating any law of the United States, and, as I advised counsel at the time, he does not have to know that. It is enough that he knows what he is doing, that he acts intentionally and not as the result of a mistake, and that he intended to defraud the bank, that is enough." (transcript 117).

* * *

> "Now, you will note that in describing the elements of the crimes charged here, I have said that the defendant must have acted knowingly and intentionally. Now, this does not mean that a defendant must be aware that his conduct is criminal or that it violates any law of the United States...." (transcript 120)

* * *

Finally, in the supplemental instruction requested by the jury the court admonished them clearly to disregard the defendant's testimony on the issue of his intent (transcript 133-135).

The issue of intent was submitted by the court to the jury principally on the theory that the Manufacturers and Traders Trust Company bank where the single bond was cashed was an agent of the United States Government (transcript 30). The apparent reasoning of the court was that because Halbach admitted that his purpose was to obtain a sum of money from the bank (transcript 70) his only possible intent could have been to defraud the Government through its agent, the bank. This theory is reflected in the instructions to the jury (transcript 114, 115, 134).

Had the court permitted the jury to consider Halbach's testimony as to his intent, even in the face of such an instruction,

a not guilty verdict would have been possible. Even though Halbach admitted his purpose was to obtain a sum of money from the bank, the jury would have also had before it testimony that he did not know that the Government was involved from which it could have concluded that he did not know that the bank was the agent of the Government and could have found that Halbach consequently did not entertain the requisite specific intent.

The court also submitted an alternate theory to the jury with respect to the issue of intent; the "interference with governmental function" theory (transcript 118-120). The jury should have been permitted to consider Halbach's testimony under this theory also.

The necessary result of the court's rulings on the admissibility of evidence and its instructions to the jury was, in essence, to withdraw the question of intent from the jury and raise a conclusive presumption that Halbach entertained the necessary specific intent. This was erroneous.

> "Where intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury....

> It follows that the trial court may not withdraw or prejudge the issue by instruction that the law raises a presumption of intent from an act...." Morisette v. United States, 342 U.S. 246, 247 (1952).

It is respectfully submitted that the court's ruling with respect to the excluded testimony and its instruction to the jury on the issue of specific intent, considered either individually or jointly, constitute error requiring reversal and a new trial.

II

THE INSTRUCTIONS OF THE TRIAL COURT TO THE JURY ON THE ISSUE OF SPECIFIC INTENT, ALTHOUGH CONTAINING REFERENCES TO THAT ELEMENT OF THE OFFENSES CHARGED, RESULTED IN REVERSIBLE ERROR BECAUSE THE INSTRUCTIONS WERE CONTRADICTORY, INCONSISTENT AND MISLEADING.

Appellant is mindful that as a general proposition the adequacy of instruction to the jury is to be determined by considering the instruction as a whole. United States v. Fletcher, 444 F. 2d 619, 620 (10th Cir. 1971). The instruction given by the court in the instant case appears to contain at one place or another references to the requisite specific intent to defraud the United

States and all of the elements of the offenses charged in the five counts of the indictment. Appellant submits, however, that the instructions given by the court require reversal because the required elements were presented so disharmoniously and mixed with inconsistent instructions as to render the whole contradictory and misleading. "Instructions to the jury must be consistent and not misleading. The fact that one instruction is correct does not cure error in giving another inconsistent one." Mann v. United States, 319 F. 2d 404, 410 (5th Cir. 1963). "The jury should not be required to determine which part of a contradictory charge is correct." Polansky v. United States, 332 F. 2d, 233, 236 (1st Cir. 1964).

The court referred to intent at several places in its instructions. With respect to the element as it applied to the "forgery" counts II through IV of the indictment, the instructions were framed in terms of both general intent to defraud (transcript 113, 117-118) and specific intent to defraud the United States (transcript 115). With respect to this element as it applied to the "uttering" count V of the indictment, the instruction referred to both general (transcript 116, 117, 118, 120) and specific (transcript 117, 118, 120) intent. With respect to this element as it

applied to the "conspiracy" count I of the indictment, general (transcript 124) and specific (transcript 122, 123) intent elements were included. As previously submitted, it is the specific intent to defraud the United States, not a general intent to defraud which is the essence of each of the offenses charged.

The instruction also mixes the concept of intent, common to all elements of the indictment, with the concept of acting "knowingly" which is a statutory element of only count V and derivatively of count I (transcript 115, 117, 118, 120, 123, 124).

It is respectfully submitted that the result of the foregoing was that the issue of specific intent was not fairly presented to the jury. Even if it had been fairly presented in the initial instructions, the supplemental instruction can only have irretrievably clouded the issue (transcript 133-134). There the jurors were told in the clearest terms: "I am sure you have in mind the defendant's testimony to the effect...he did not realize he was defrauding the United States, words to that effect, that he did not intend to defraud the United States. ...as I explained with some detail, it is not necessary that the defendant know that he is violating a Federal law or that he is defrauding the United States, it is no part of the crime." (transcript 133-134).

> "In a trial by jury in a Federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law.' (citation omitted). 'The influence of the trial judge on the jury is necessarily and properly of great weight.' (citation omitted), and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract." Bollenbach v. United States, 326 U.S. 607, (1946).

It is respectfully submitted that the quality of the instructions to the jury requires reversal and a new trial.

III

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED APPELLANTS' MOTION FOR A JUDGMENT OF ACQUITTAL WITH RESPECT TO COUNTS I AND V OF THE INDICTMENT BECAUSE THERE WAS NO EVIDENCE TO SUPPORT THE OFFENSES CHARGED IN THOSE COUNTS.

The Appellants' Motion, in General

At the close of the Government's evidence, counsel for

the appellant moved for a judgment of acquittal pursuant to Title 18, U.S.C. r. 29 (a) on count V, the "uttering" count and count I, the "conspiracy" count, of the indictment on the ground that the evidence was insufficient to sustain a conviction on those counts (transcript 63-64). The court denied the motion (transcript 64).

The "Uttering" Count - Count V

Count V of the indictment charged as follows:

> "On or about the 9th day of August, 1973, in Buffalo, New York, the defendant, Keith C. Halbach, did utter and publish as true a forged United States savings bond, to wit, Serial No. M 4001204339E Bond, with a face amount of $1,000.00, owned by Richard Clarence Yox, with intent to defraud the United States, knowing the same to be forged in violation of Title 18, United States Code, §495."

The uncontroverted evidence was that the Bond was genuine and only the endorsement on the back was forged. It is respectfully submitted that the consequence of this variance between pleading and proof was to render the evidence insufficient to prove Halbach guilty of the crime charged in count V.

It is well settled that a forged endorsement on the back of a genuine Government obligation does not render the obligation

itself a forgery. Prussian v. United States, 282 U.S. 675 (1931), United States v. Brown, 246 F. 2d 541 (2d Cir. 1957), Gesell v. United States, 1 F. 2d 283 (5th Cir. 1924), See also Rogers v. United States, 304 F. 2d 520 (5th Cir. 1962) (dissent). Count V of the present indictment alleges strictly the forgery of a United States savings bond without making any reference to the endorsement. This count was drafted unlike the count in Prussian v. United States, supra, wherein the count was sustained under the predecessor to Title 18, U.S.C. §495 because in that instance; "The indictment allege(d) specifically and with certainty the forgery of the endorsement on the draft for the purpose of obtaining a sum of money from the Treasurer of the United States...." 282 U.S. 675, 679. Count V makes no mention of a forged endorsement.

The proper theory of pleading was suggested in Gesell v. United States, supra, where the court stated:

> "Now had the pleader charged that the said Howard E. Gesell... having obtained possession of a genuine obligation of the United States, to wit, a registered convertible gold note, etc., did falsely forge an order, contract and writing on the back thereof, to wit, the words (setting out the forged endorsement), for the purpose of obtaining, receiving and enabling any other person to

> obtain or receive from the United States,etc., a sum of money, etc., or had the pleader charged that the said Howard E. Gesell...having obtained a genuine obligation of the United States, to wit (describing it), did publish as true a false and forged order, contract and writing on the back thereof, to wit (setting out the endorsement), with intent to defraud the United States, knowing the same to be false and forged, certainly a charge would have been laid under §29,[3] to which the proof in this case would have conformed." 1 F. 2d 283, 288.

It is respectfully submitted that because count V as drafted is based only upon a forged instrument theory and the proof does not support that theory, the count should have been dismissed.

The "Conspiracy" Count - Count I

Count I of the indictment charged as follows, with respect to the object of the conspiracy:

> "That beginning on or about the 9th day of August, 1973, in the Western District of New York, the defendants, Keith C. Halbach and Jack E. Gilmet, willfully, knowingly and unlawfully

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(3) §29 was the predecessor to Title 18, U.S.C. §495.

> did combine, conspire and agree together with each other to defraud the United States and to commit offenses against the United States, to wit, to violate Title 18, United States Code, §495, by uttering and publishing as true, forged United Savings Bonds in violation of Title 18, United States Code, §371."

None of the United States savings bonds involved in the case were proved to have been forged bonds. Merely the endorsements on three of them were proved to have been forged.

The facts appear to be essentially the same as those in Danielson v. United States, 321 F. 2d 441 (9th Cir. 1963) wherein James Colby Danielson, Arthur James Yee and Joe Waugh were charged in the first count of an indictment with having conspired in violation of Title 18, U.S.C. §371 as follows:

> "they conspired in violation of §495, Title 18, United States Code, to knowingly, falsely make, forge and counterfeit and knowingly utter and publish as true, with the intent to defraud the United States of America, 171 United States savings bonds***, for the purpose of obtaining and receiving from the United States and its officers and agents a sum of money." 321 F. 2d 441, 442.

All three defendants were convicted and Danielson appealed. In reversing his conviction the court held:

> "Although the indictment was not fatally defective, we agree with the appellant that the evidence in the record is insufficient to prove the particular conspiracy that was charged. Appellant was charged with having conspired with Waugh and Yee to forge and utter as true United States savings bonds. The evidence reveals, however, that the bonds were valid bonds which had been stolen from their registered owner (who at all times was entitled to receive the value thereof) and that Arthur James Yee signed the rightful owner's name on the reverse side of the bonds in the place provided therefor. A distinction has been recognized in the cases between the forgery of an obligation or security such as a bond and the forgery of endorsements or other writings upon genuine obligations or securities. Yee was in fact charged in the second count of the indictment with having forged writings on the bonds and not with having forged the bonds. While perhaps it could be argued that appellant could have been charged with a conspiracy to commit the offense charged against Yee in the second count, he was not so charged. We do not feel that the variance in this case can be dismissed as harmless error." 321 F. 2d 441, 444-445.

In United States v. Calabro, 467 F. 2d 973 (2nd Cir. 1972) this court acknowledged the Danielson rationale but declined to adopt it under the facts before it. In considering the conspiracy count

of the indictment against Calabro the court stated:

> "The conspiracy count..., charged a conspiracy to forge and utter bonds and money orders, known to have been forged, with the intent to defraud the United States. Read literally this does not charge a conspiracy to forge endorsements. See Danielson v. United States, 321 F. 2d 441, 444 (9th Cir. 1963). However, the evidence showed a conspiracy to forge bonds themselves as well as to forge endorsements on valid bonds. ...Thus, a conspiracy to violate §§471 and 472 was charged, even if we take a possibly over-technical view and find that one under §495 was not, and the evidence sustained the charges." 467 F. 2d 973, 980-981.

Because the conspiracy proved in Calabro was broad enough to cover not only uttering forged endorsements, which the conspiracy count in the indictment did not charge, but also uttering forged bonds, which the conspiracy count in the indictment did charge, the result was correct. The instant case is quite different because the record contains no evidence sufficient to bring the activities of Halbach and Gilmet within the ambit of "uttering and publishing as true, forged United States savings bonds", the only theory charged in count I. Even if count I of the indictment did include forged endorsements within the objective of the conspiracy, there is no evidence in the record to sustain such theory. Gilmet never even

saw Halbach place an endorsement on the bonds (transcript 59). There is no evidence that Gilmet ever understood that the bonds did not already bear a valid endorsement by Yox and that Halbach would have to forge an endorsement in order to cash them. Neither is there any evidence in the record to sustain a conspiracy theory relative to offenses against the United States in any respect. The relevant witness was the co-defendant, Jack E. Gilmet, called to testify by the Government (transcript 55-62).

The pertinent portions of Gilmet's testimony are as follows:

(BY MR. BURNS)

* * *

Q. Back on August 9, 1973, did the defendant ever come and speak to you regarding some United States savings bonds?

A. Yes.

Q. What did he say?

A. He said he had some bonds that he wanted to be cashed. (transcript 56).

* * *

Q. And did he show them to you?

A. No.

Q. Did he say what they were?

A. Bonds.

Q. Did he say they were United States savings bonds?

A. No.

Q. What did he say?

A. He just said he had some bonds. (transcript 57).

* * *

Q. Did Mr. Halbach tell you what he was going to do?

A. He said he was going to cash the bonds.

Q. Did he show you any of the bonds?

A. No.

Q. Before he went in the bank did you see him write anything on the bonds?

A. No.

Q. Did you ever have any conversation about what was going to be done?

A. No, just said he was going to cash another one.

Q. Was there any conversation about what was going to be done with these bonds?

A. Yes, he said he was going to try to cash them. (transcript 58-60).

* * *

Neither in the testimony of Keith Halbach (transcript 65-74), nor in the testimony of Special Agent Patrick J. Finnerty, particularly as it related to a confession made by Halbach (transcript 53-54), nor elsewhere in the record is there any evidence which adds to the foregoing. In Ingram v. United States, 360 U.S. 672 (1959) the court ruled:

> "It is fundamental that a conviction under 18 U.S.C. §371 cannot be sustained unless there is 'proof of an agreement to commit an offense against the United States' (citation omitted)." 360 U.S. 672, 678.

The record is barren of any evidence that Gilmet knew that the 'bonds" were United States Government obligations of any sort. It is respectfully submitted that lacking such knowledge he could not have entertained the intent to "defraud the United States and to commit offenses against the United States". "Without knowledge the intent cannot exist". Ingram v. United States, supra at 678 citing Direct Sales Co. v. United States, 319 U.S. 703,711. See also United States v. Gallishaw, 428 F. 2d 760 (2nd Cir. 1970). That being so a conspiracy "to defraud the United States and to commit offenses against the United States" cannot have existed.

> "[C]onspiracy to commit a particular substantive offense cannot exist without at least the degree of criminal intent necessary for the substantive offense itself." (footnote omitted) Ingram v. U.S., supra at 678.

Viewing the evidence most favorably to the Government, only a conspiracy against Richard Yox under New York State law has been proved. There being in the record neither proof to support the "forged bond" theory which was the basis for count I nor proof to support any conspiracy to defraud the United States, count I should have been dismissed.

It is respectfully submitted that the trial court's failure to grant the appellants' motion for a judgment of acquittal on counts I and V "...destroyed the defendants' substantial right to be tried only on charges presented in an indictment returned by a Grand Jury". Stirone v. United States, 361 U.S. 212, 217 (1960). The charges which were proved and of which the appellant was convicted were completely different.

CONCLUSION

For the reasons stated above the appellant respectfully submits that the judgment of the District Court must be reversed

and a new trial ordered on counts II through IV of the indictment and that counts I and V of the indictment must be dismissed.

Dated: July 19, 1974

Respectfully submitted,

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